YLAL RESPONSE TO MINISTRY OF JUSTICE CALL FOR EVIDENCE ON IMMIGRATION LEGAL AID FEES AND THE ONLINE SYSTEM

Young Legal Aid Lawyers ('YLAL') was formed in 2005. We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded.

YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales.

We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

YLAL was set up and operates to pursue the following objectives:

- To campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it.
- To increase social mobility and diversity within the legal aid sector.
- To promote the interests of new entrants and junior lawyers and provide a network for like-minded people beginning their careers in the legal aid sector.

Following the publication of the Call for Evidence, we organised a roundtable for our members to discuss the questions raised. This response reflects the discussion at that roundtable as well as other input from our members.

In the introduction to this Call for Evidence, it is noted that evidence is intended to be used to form policy proposals for a forthcoming consultation on new legal aid fees for asylum and immigration appeals. The consultation states that:

These fees are intended to reflect the changes in tribunal process resulting from the introduction of the online system and ensure that legal aid practitioners are adequately remunerated for their work in representing some of the most vulnerable people in our society.

YLAL urges the Ministry of Justice to ensure that any further reforms to legal aid fees in this area live up to this statement of intent.

It is true that practitioners in this area represent some of the most vulnerable people in society and we urge the Government to ensure that any further proposals ensure that those working in this area are properly renumerated for work that they do.

1. Differences between the online system & the process prior to the online system

1. What do you consider to be the key differences between the online system and the paper-based process in place prior to the introduction of the online system?

There are a number of differences between the online system and the paper-based process which are:

a. the new system front-loads the work required;
b. the new system has more stages that need to be completed;
c. the online system is rigid; and
d. new technology may be required by the move to an electronic system.

Front-loading and stages

The fundamental difference between the online system and the paper-based process is that the online system requires work to be front-loaded. For instance, those acting for appellants have to prepare an appellant bundle and draft an Appeal Skeleton Argument

('ASA') at the start.

Furthermore, due to the staged nature of the online system, practitioners have found that it can take a very long time to complete the process. This in turn means that the appeal process itself has become longer; in the previous system, hearing notices were usually received three weeks after an appeal was lodged but under the current system appellants can wait months for tribunal correspondence. This period of limbo can be particularly distressing for clients.

Rigid online system

The rigidity of the online system also causes delays because appellants cannot proceed to the next stage until the previous stage is complete - even if the previous stage is beyond their control. For example, if the Home Office delays in uploading the respondent bundle or fails to upload it, the appellant cannot submit their own bundle which halts the progress of their appeal.

In some cases, members reported being criticised by the Tribunal have for failing to adhere to directions when, in reality, the system precluded them from taking further steps because the Home Office bundle has not yet been submitted.

Case workers and solicitors described having to contact the tribunal to bring the issue of non-submission to their attention, sometimes offering to submit the respondent bundle on their behalf, in order to ensure the appeal process can keep moving.

Participants expressed that in general the tribunal is willing to grant an extension of time when requested by the Home Office to upload their documents which causes further delays in the appeal process. From a case management perspective, there appear to be few consequences for late compliance with directions by the Home Office which exacerbates delays.

We are aware that on some recent occasions the Home Office has written to Tribunal hearing centres to inform that that there is a backlog in processing files which require

uploading for hearings and as a result in some circumstances there will be no Respondent's bundle for the hearing.

One YLAL member, who was part of the online system pilot scheme in 2019, said:

> *'There have been significant delays since the roll out of the system nationally… it's taking months and months for the Home Office to upload their bundles – on one occasion we waited for approx 3 months for a corrected bundle to be uploaded. Dates get pushed back without penalisation. In terms of withdrawal, I've had conduct of two cases where the Home Office have withdrawn the day prior to the hearing. We still had to go to the hearing the following day. In both cases, this could have been noted at Respondent Review stage. It just seems as though the Review is not being engaged with properly, we've seen stock answers… generic responses to our ASA.'*

Some YLAL members have noted that the move to an online system means that practitioners are working with electronic documents rather than paper ones which can be easier to manage than a paper-based process. However, this can require access to facilities and technology e.g. headsets for virtual hearings, and multiple devices to manage documents during a hearing. For some junior practitioners starting out on relatively low incomes from legal aid work, this technology can be prohibitively expensive.

Electronic Documents

Some YLAL members have noted that the move to an online system means that practitioners are working with electronic documents rather than paper ones which can be easier to manage than a paper-based process. However, this does require access to facilities and technology that should not be taken for granted.

2. For each of the differences identified in answer to question 1, what do you consider to be the impact of those differences on your work?

The impact of the differences identified within the new system differs depending on how the individual practitioners or organisations approach casework generally.

When the new system was introduced it essentially functioned as a hybrid system that meant practitioners had to operate the old process and the new at the same time. On top of the difficulties of using two systems simultaneously, every time the system changes individuals have to be retrained to use it. This takes time and resources away from firms and organisations who may already lack the staff and resources to sustain their work in this sector.

Because the appellant bundle has to be prepared so early on, the evidence is often dated or incomplete by the time the final appeal hearing is listed. This is particularly true of medico-legal expert reports which often need to be revisited to ensure they are up to date. Not only is it time-consuming for practitioners to re-instruct an expert (who should ideally be the same expert); it also causes clients unnecessary distress, especially where the client is at risk of being re-traumatised by the experience of revisiting difficult experiences repeatedly.

The respondent bundle (when submitted) often only contains the initial refusal document, which is unsatisfactory in cases where more information is required. This leads to further delay in a system where it is not uncommon to have to wait six months to a year for a listing. If counsel is instructed early on, which is often necessary for complex appeals, then solicitors and caseworkers have to keep going back to them with updated bundles which creates additional administrative costs and further delay.

The feeling among some members is that the system is more difficult than it used to be.

Non-compliance

YLAL members have found there to be a general and persistent lack of compliance with tribunal directions by the Home Office. Put simply, Home Office non-compliance results in appellants being unable to advance their appeals. Not only does this undermine access to justice; it also goes counter to one of the aims of the system, which was to encourage the Home Office to take stock, review decisions and save time.

Where the Home Office does upload its documentation as directed, some practitioners

reported that they did not receive notification of the update. Some described feeling that they have to check the system every day to ensure that they are not inadvertently missing deadlines.

The persistence of significant delays from the Home Office is suggestive of a general problem of delays rather than one specific to the online immigration appeal system.

3. Please explain how case management review hearings were used prior to the online system, and how they are being used as part of the online system.

The members we engaged with did not respond specifically to the question of how case management review hearings were used prior to the online system, but the issues around delays and the consequences for non-compliance with directions mentioned in response to questions 1 and 2 are key features of case management review hearings under the new system.

2. The Appeal Skeleton Argument

4. Please explain whether, and if so, at what stage, appeal skeleton arguments were used prior to the introduction of the online system.

There was no requirement for an Appeal Skeleton Argument ('ASA') prior to the introduction of the online system.

Before the online system, it was common for barristers to use skeleton arguments, which were typically prepared shortly before the hearing, but on some occasions barristers would use detailed grounds of appeal instead depending on whether this was appropriate for the case. There was no formal requirement for a skeleton argument and they take hours to prepare. Even when skeletons were used in the previous system, they were not the same as the ones required under the online system as this now requires ASAs to be submitted in a specific format, which includes a schedule of issues.

5. What do you consider the role of the appeal skeleton argument to be under the online system?

Some YLAL members have found that the ASA presents a new opportunity to have a decision reconsidered before a substantive hearing that did not formally exist prior to the introduction of the online system. Some participants reported experiences of the Home Office withdrawing a decision having considered the ASA, thus avoiding the need for a full hearing. While this may be considered a welcome aspect of the introduction of the ASA, a more sustainable solution must be to address the quality of initial decision-making by Home Office decision-making (see for example, the issues raised in the Independent Chief Inspector of Borders and Immigration's report on the inspection of asylum casework dated 18 November 2021). Many participants also stated that the level of Home Office engagement with the ASA was variable, with it sometimes being effectively ignored.

Although some YLAL members have found anecdotally that refusal decisions are more regularly being withdrawn, the system gives no indication of what happens next to a client's case. The result is that practitioners have to attempt to contact an unknown Home Office decision-maker to find out when a new decision will be made.

Once contact is made, practitioners often find that they are not given reasons for the withdrawal of the decision or any indication as to who will make the new decision, when it will be made or how it will be made - i.e. whether any future decision is likely to result in a grant of leave to remain. Clearly, this is unsatisfactory and can lead to agonizing uncertainty for clients. Participants reported clients waiting for months after a withdrawal to find out what happens next: if these cases had proceeded to a full hearing, they would have had that certainty with the tribunal decision which could be handed down 1-2 weeks after the hearing.

Appellants deserve clarity and have a right to know when their claims will be finally determined. It is not fair to have a situation where appellants can face long periods of uncertainty before knowing the outcome of their claims.

6. Do you have evidence of any instances under the online system in which an appeal skeleton argument was not required or was not produced? If yes, please summarise your experiences and explain why an appeal skeleton argument was not required or produced.

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7. Can you describe whether, and if so, how, an appeal skeleton argument under the online system differs between asylum and non-asylum immigration cases?

In discussion, participants expressed that it was not easy to make generalised distinctions between asylum and non-asylum cases because of the diverse nature of the cases within both categories.

8. How long (in hours) does an appeal skeleton argument take in asylum and non- asylum cases? Do you have any examples/evidence to support this?

Our members indicated that the distinction between asylum and non-asylum cases is not particularly helpful, and may obscure the diverse range of work done under both headings. Both kinds of case can be equally complex and take the same amount of time to prepare, and there can be a great range in both categories of the time needed to prepare a skeleton argument which depends more on factors such as the complexity of the factual background, the range of issues in dispute, the need for and nature of any expert evidence, the case history, and the complexity of any issues of law involved. A fee structure based on a headline distinction between 'asylum' and 'non-asylum' cases is likely to minimise the impact of these important factors.

We would be concerned by any move to use anecdotal reports to base fixed-fee rates upon, especially as the impact of such a regime could be catastrophic in terms of access to justice for people with more complex legal needs (see our report *A sector at breaking point: Justice denied for victims of trafficking*). An attempt to do so without reliable quantitative data (of a kind we are not equipped to provide) would be problematic.

We believe there is not enough evidence at the current moment to justify a fee structure for ASA preparation, other than hourly rates, that is reflective of the work involved in individual cases.

9. Anecdotally we understand that the requirement for an appeal skeleton argument may have resulted in counsel being more routinely instructed in appeal cases. What are your views on this understanding?

This question had a mix of responses at our roundtable. Whether and when counsel is instructed depends on the approach of the individual practitioner or organisation to casework. In our roundtable event, one law centre noted that they routinely instruct counsel early on whilst others do not. The requirement to submit an ASA at an early stage has resulted in some immigration caseworkers and solicitors drafting the skeleton themselves. However, some organisations do still expect counsel to draft the ASA. It was not possible to identify an overall pattern.

10. Can you describe whether, and if so, how, an appeal skeleton argument under the online system differs between cases that result in a substantive hearing and cases that do not? Please also comment on whether this differs between asylum and non-asylum cases that result in a substantive tribunal hearing.

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3. Tribunal hearings

11. Do you consider that the introduction of the online system has had an impact on the work necessary to prepare for a substantive hearing? If so, please explain how and why.

According to some YLAL members, evidence-gathering and 'packaging' (i.e. preparing a

bundle) become much more demanding when preparing a case for the online process.

Firstly, the new online system requires front-loading work: including the ASA and gathering evidence, such as medical records and expert opinion. Expert evidence is often the linchpin of a successful appeal and can tip the balance at the Respondent Review stage. This, however, creates further work down the line, as these reports may expire and/or need updating.

Secondly, while the introduction of the ASA has had the most noticeable impact on time spent, there has been an increase in administrative workload. Organisations often have to maintain both the new online system and their own internal system. Often, these systems cannot be merged, leading to time-consuming but necessary duplication which is a surprising by-product of a system created to reduce administration.

YLAL members have also noted practical issues with the system that can have a significant impact on case preparation:

- There is a lack of consistency in the way deadlines for directions are expressed.
- Paper and online appeal references are both regularly used, which can cause confusion - especially for unrepresented appellants.
- Another issue is when the appeal '*falls out of the online system*'. Lawyers then need to try to retrieve the bundle which, according to YLAL members, takes a significant amount of time leading to further delays. One member recalls a case where the appeal was cancelled due to the lack of response from previous representatives. When attempting to retrieve the bundle for the cancelled appeal, the YLAL member was later advised to start a new appeal altogether.
- The time spent on administration compromises practitioners' ability to focus on their clients who often need intensive support to navigate the appeals process, especially where they have previously experienced trauma.

12. Do you consider that the introduction of the online system has had an impact on what happens on the day of the substantive hearing itself? If so,

please explain how and why.

YLAL members mentioned that there were several practical issues associated specifically with the use of online hearings, particularly as appellants and witnesses often do not usually have access to the requisite technology and often require interpreters. A YLAL member described her concerns about clients with vulnerabilities and protected characteristics going through whole process, never seeing a lawyer in person and then just being given a link to a hearing on the day. We endorse the findings of Public Law Project report, 'Online Immigration Appeals: A Case Study of the First-Tier Tribunal', which broadly reflect the experiences of our members working in this area of law.

It is also the experience of some YLAL members that tribunal decisions as to whether a virtual or in-person hearing is most appropriate can seem inconsistent and members have experienced cases in which specific requests are made for a hearing to be in-person due to an appellant's vulnerabilities and these are refused.

In our Response to the Civil Justice Committee Rapid Consultation on Remote Justice we pointed out that:

> *'In some jurisdictions, for example Family and Court of Protection, comprehensive guidance has been issued on the principles to be applied when considering whether to conduct a hearing remotely. Where such guidance has been issued, there tends to be less geographical variation in decision-making. Where, however, comprehensive guidance has not been issued, for example in Inquests or Immigration, there is considerable geographical variation in decision-making with practitioners often being unsure as to how representations on the mode of hearing will be received.'*

4. Immigration legal aid fees

13. Please provide evidence as to whether the previous controlled legal representation fee structure of stage 2a and stage 2b payments based on whether a case went to a hearing, would be suitable for asylum and

immigration appeals using the online system?

YLAL would oppose any return to the previous fee structure before the introduction of the 2020 Regulations because the evidence of our members is that they were not properly remunerated, as seen in the closure of many legal aid immigration firms, growth of immigration advice deserts across England and Wales and an ageing sector.

One of the primary concerns with the 2020 Regulations, which on the face of it would have increased the fixed fee payable for many providers, is that the escape fee threshold would have been insurmountable for providers who relied on meeting it to sustain their practices and ensure the best service for their clients. The fact that so many providers relied on meeting the escape fee threshold shows that the stage 2a and 2b fixed fees were never enough: in order to survive, many of these providers *had* to reach the escape fee and make it to hourly rates.

We are particularly concerned about the impact of a fixed-fee system on those with more complex legal needs. In June 2020, we published our report *A sector at breaking point: Justice denied for victims of trafficking*, which included survey findings demonstrating how difficult anti-slavery support organisations found it to access legal advice for victims of trafficking as a result of the market failure for asylum and immigration advice. 70.6% of respondents said that it was either impossible, extremely difficult or difficult to find a legally aided representative for their client. Respondents consistently said that there were few immigration legal aid providers and that the ones available often did not have capacity to take on new cases. Despite this, respondents were clear that access to legal aid for asylum and immigration matters is essential for victims of trafficking to recover from their trauma. As one respondent put it, "it is everything."

Trafficking cases can be complex and are exactly the kind of work that is likely to fall in the 'danger zone' of a fixed fee system (i.e. involving hours of work greater than the fixed fee but less than the escape fee). In these cases, legal aid lawyers are effectively being asked to work for free if they undertake high quality and time-consuming work that falls short of the increased escape fee threshold. This makes it financially unsustainable for law firms to provide services for people with complex immigration needs, such as victims of trafficking,

and the legacy of the previous fixed fee regime goes some way to explaining the dire state of access to justice in this area.

Accordingly, we are concerned that any move towards a fixed fee system for asylum and immigration appeals would have significant negative effects on the sustainability of legal practice and access to justice.

We also note that from an administrative perspective, the current 'hybrid' fee scheme is unworkable for very small businesses that do not have the resources to dedicate to more intensive billing due to decades of cuts and a lack of investment in the infrastructure of the sector. Therefore, any proposal should include consideration of how the process can be streamlined to reduce the administrative burden on providers who are already overstretched.

14. Please describe what type of work you consider to be remunerable under the 'additional payments for advocacy services: substantive hearing' and 'additional day substantive hearing' fees.

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5. Public Sector Equality Duty

15. Please provide evidence on the protected characteristics and socio-demographic differences of individuals who are using the online system, both legal aid clients and legal aid providers, including instructed counsel?

As the Ministry of Justice acknowledges, clients represented in immigration and asylum cases are some of the most vulnerable people in society. It is likely that the vast majority of individuals in asylum and immigration cases have at least one protected characteristic.
It is therefore particularly concerning that there is evidence that many individuals needing legal advice for immigration matters cannot access it because of financial pressures on the sector. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') removed

most non-asylum cases from the scope of legal aid and fees in areas that remained in scope have reduced. This has made it extremely difficult for firms to remain financially viable.

The consequence of this is that many organisations are choosing to take on less legal aid work, and to replace it with private work. Research by Refugee Action shows that there has been a 56% drop in the number of asylum and immigration legal aid providers since 2005. The Westminster Commission on Legal Aid heard evidence on the impact of legal aid cuts on the provision of legal advice for those who need it (at paragraph 43):

> *'We were told by Dr Jo Wilding that demand outstrips provision even for cases within the scope of immigration legal aid in every region of England and Wales. In her report, A Huge Gulf: Demand and Supply for Immigration Legal Advice in London, she estimates that there is capacity for just over 10,000 immigration and asylum legal aid 'matters', and a maximum of 4,500 pieces of specialist immigration casework outside of the scope of legal aid per year in London.*
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> *On the demand side, she estimates that at least 238,000 people who are undocumented in London would be eligible to make an application to regularise their immigration status; 23,000 individuals need to extend their leave to remain; and an unknown number of EU citizens who did not apply for settled status before the deadline on 30 June 2021 will need specialist advice.*
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> *… We were told that many people arriving in the UK are unable to access a lawyer at an early stage as there is so little capacity in the sector.'*

In terms of the experiences of practitioners, YLAL has grave concerns regarding the sustainability of the immigration legal aid sector. Structural barriers are preventing many from beginning a career in immigration legal aid work and causing a number of those who do to discontinue their careers in the field or to move over to privately paid work.

In its Social Mobility Report 2018, YLAL found that challenges such as low pay, high debt and stress cause many to reconsider their decision to work in legal aid. These barriers were more acute for legal aid practitioners in three groups:

(a) people with mental health and physical disabilities;
(b) people with caring responsibilities; and
(c) people from lower socio-economic backgrounds.

Aspects of the new system may worsen these issues, such as the increased workload in the new system. A YLAL member pointed out that, whilst more work is now required at an earlier stage, if the same number of solicitors or caseworkers are dealing with cases, they will now have less time to devote to those cases, leading to poorer quality work, deadlines being missed, poorer client care, solicitors taking on fewer cases and inevitably an impact on wellbeing and morale.

We welcome the expressed commitment of the MOJ to '*ensure that legal aid practitioners are adequately remunerated for their work in representing some of the most vulnerable people in our society*'. Positive words must be supported by action to repair the damage done by decades of underfunding of legal aid. We believe much more must be done in order to make immigration and asylum legal aid work a realistic, sustainable and attractive career for junior legal aid lawyers.

6. Additional evidence

Please share any additional views, with supporting evidence, in relation to the online system that are not covered by the questions above but that you would like to be considered as part of this Call for Evidence.

The purpose of introducing the online system was to streamline the appeal process and save money. However, YLAL members have found that the central problem with the speed and standard of decision-making at the Home Office. Decisions which previously took weeks are now taking many months, and years in some cases. Changes to the system do not address these organisational problems at the department which, according to our members, appear to have worsened through the pandemic.

A further difficulty is that there is little evidence on which to base responses to the new

system. The system has not been in place for long enough to get a clear picture of its potential benefits and drawbacks, and this period has been highly disrupted by the COVID pandemic. We believe the online system should be monitored for an additional period of time, followed by a further consultation so that responses can be based on a sound understanding of its impact. It is difficult to assess the impact on clients and practitioners with little data from the MoJ and in the exceptional context of the pandemic.

In light of the limited evidence on which to base responses to the Call for Evidence, we believe it would be beneficial for the Ministry of Justice undertake and publish an analysis of its data on the following issues:

1. How long is it taking for cases to be determined under the new procedure versus the old procedure?
2. Is there data on compliance by the Home Office with tribunal directions?
3. How many appeals have taken place under the new online procedure?
4. How many appeals had taken place under the old procedure?
5. What percentage of decisions were withdrawn in both the old and new procedures?
6. What has happened to the cases following withdrawal?
7. What is the length of time for a new decision to be made?
8. How will the MoJ monitor the impact of the online system on those with protected characteristics?

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